An Independent Judiciary*

Ruma Pal†

10th November 2011

The usual platitudes are inadequate to describe the honour conferred on me today by asking me to deliver a talk in memory of such an outstanding and multi-faceted personality as Justice V.M. Tarkunde. Unfortunately I never knew him personally but by all accounts his life reflected his deep commitment to ethical values: a commitment which he brought into every role he played in his life including those of a judge and a lawyer. In keeping with his strong principles, in 1981 he fought for the independence of the judiciary (as a petitioner before the Supreme Court[1] on behalf of 3 Additional Judges of the Delhi High Court). Incidentally one of those judges, Justice S.B. Wad, was my professor when I read for a law degree at Nagpur. This however is not the reason for my choosing to speak on an Independent Judiciary and what it means today. I chose the topic for several reasons: the issue is one which was close to Mr. Tarkunde's heart, it is of topical interest and it is also a subject which has bothered me greatly both during my career as a lawyer and as a judge. So I welcome this opportunity to speak my mind on the subject from the safe haven of retirement.

Independence

In writing of India's chances of ascending the international rankings in the coming years, Edward Luce in his book 'In spite of the Gods' says: "India also possesses institutional advantages that have convinced some people that the Indian tortoise will eventually overtake the Chinese hare. As India's economy develops, these 'soft' advantages, such as an independent judiciary and a free media, are likely to generate

*Lecture delivered at V. M. Tarkunde Memorial Lecture in IIC, New Delhi on 10th November 2011. Published in *The Radical Humanist* magazine on December 2011, Vol. 75, No. 9, pp. 6–15.

†Former Judge of Supreme Court of India between 2000–2006.

[1] *S. P. Gupta v. Union of India*, 1981 Supp SCC 87.

ever-greater returns"[2]. But is the judiciary in India really independent? A complete answer to the question warrants a doctoral thesis and a short discourse like of today is necessarily selective and therefore incomplete. I have tried to maintain a balance between legalistic and lay approaches while making it clear which side of the fence I stand.

Any attempt at an answer must be prefaced with two questions both of which I seek to briefly answer: The first question is: Who do we include within the term "judiciary"? Is it limited to Constitutional Courts or does it also include those tribunals which decide rights and have the trappings of a court? Second: What does 'independent' mean? I will answer the second question first.

Different dictionaries have given as many as 12 different meanings to the word 'independent'. Of the twelve I have chosen three — 'Freedom from outside control'; 'Not influenced or affected by others'; 'impartial' and 'capable of thinking or acting for oneself'. Independence in all these senses must be complete, unimpaired and uncorrupted and that means first — that independence is antithetical to corruption and second — that it is ensured by accountability. The Chief Justice of India hast recently spoken of "institutional integrity"[3] and he drew distinction between personal and institutional integrity. I would like to borrow that phrase and draw a distinction between the institutional independence of the judiciary and the independence of a judge.

Institutional Independence

The independence of the judiciary which, to use the language of the Supreme Court, the Constitution so 'copiously' protects,[4] is institutional independence with institutional immunity, insulation and autonomy [primarily from the Executive] guaranteed under the Constitution.[5] It is a facet of the separation of powers which underlies the Constitution and is a part of its basic structure.[6] To ensure freedom from Executive and Legislative control, the pay and pension due to judges in the superior courts are charged on the Consolidated Funds of the States in the case of High Court judges[7] and the Consolidated Fund of India in the case of Supreme Court judges[8]

[2] P. 358.

[3] *Centre for PIL v. Union of India*, (201 J) 4 SCC J, at page 23.

[4] *Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 SCC 193, at page 2 J3.

[5] *Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 SCC 193.

[6] Registrar (Admn.), *High Court of Orissa v. Sisir Kania Satapathy*, (1999) 7 SCC 725, at page 728.

[7] Article 202 (3) (d).

[8] Article 112 (3) (d) (iii).

and are not subject to the vote of the Legislative Assembly[9] in the case of the former or Parliament in the latter case[10]. Salaries are specified in the Second Schedule to the Constitution and cannot be varied without an amendment of the Constitution. No discussion can take place in the legislature of a State with respect to the conduct of any Judge of a High Court in the discharge of his duties[11]. Nevertheless the Constitution apparently allowed a serious inroad into this freedom by virtually giving the Executive the final say in the appointment[12], transfer[13] and promotion of a judge as the Chief Justice of a State High Court or as the Chief Justice of India. All that is required of the Executive is to exercise the power in consultation with the Chief Justice and such judges of the Supreme Court or High Courts as the President thinks necessary. In practice the opinion of the Chief Justice of India on the suitability for appointment was given weight but not finality. Political considerations would on occasion trump merit. For the first 25 years after Independence apart from some aberrations the Executive left the judiciary alone in the matter of appointments to the judiciary. Again although there is no Constitutional provision prescribing the mode of appointment of the Chief Justice either of a High Court or of the Supreme Court there was a convention that the senior most would become the Chief Justice. This state of affairs continued till the seventies when the Executive began a sustained campaign to weaken the judiciary because judgments delivered by the judges did not suit the party then in power at the Centre and because of the growing perception of the Executive that the Judiciary was an 'impediment' to its political functioning.

It has been said of Britain by a British Judge that "the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it"[14]. The same could be said of the Indian Judiciary. The first assault as far as the Supreme Court was concerned, was the supersession of senior judges and the 'rewarding' of the dissenter with the high office of the Chief Justice of India. The superseded judges resigned in protest. In 1975 Emergency was declared when the powers of judicial review were severely curtailed. In 1976, 16 High Court judges were transferred to other High Courts by the Executive ostensibly with a view to strengthening national integration. The reason was rejected by the Supreme Court saying:

> It is indeed strange that the Government of India should have selected for transfer,

[9] Article 203 (1).

[10] Article 113 (1). See *Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 SCC J93, at page 217.

[11] Article 211.

[12] Article 124 (2) in case of Supreme Court judges and Article 217 in the case of High Court judges.

[13] Article 222.

[14] Quoted in "Should Judges Conduct Public Inquiries?" by Jack Beatson: *LQR* Vol 121 p.235.

> by and large, those High Court Judges who had decided cases against the Government during the emergency.[15]

In 1977 the Executive again used the 'punishment' of supersession to bypass the then senior-most judge in the Supreme Court, Justice H.R. Khanna, a politically 'inconvenient' judge, for appointment as the Chief Justice of India. Justice Khanna resigned.

The year 1976 also saw the Executive deliver what they must have perceived as the *coup de grace*[16] against a stubbornly independent judiciary, by the enactment of the 42nd Constitutional Amendment which introduced Articles 323-A and 323-B. Article 323-A authorizes Parliament and Article 323-B the State Legislatures to create tribunals to which the power of adjudication of disputes on various subjects can be transferred while excluding the jurisdiction of the courts in respect of those Subjects. The power of adjudication so transferred included the power of judicial review which allows judges of the higher courts to determine the legality of executive action and the validity of legislation passed by the legislature. These two Articles were intended to allow and in fact did allow the Executive to take over the powers of adjudication from the courts because an independent judiciary was perceived as a thorn in the flesh of political parties in power. Both Parliament and several States have been prompt in enacting legislation setting up Tribunals manned by members of the Executive to deal with a variety of subjects normally within the jurisdiction of the High Courts. Incidentally before the Amendment was carried out Justice Tarkunde formed the People's Union for Civil Liberties to stem the political onslaughts on the judiciary and 'to strive for the restoration and strengthening of civil liberties and democratic rights' which the 42nd Amendment sought to affect.[17] Unfortunately like King Canute he was not successful in stopping the political tide then. Fortunes changed after there was a change in government and the Emergency was lifted. Many of the changes brought about by the 42nd Constitutional Amendment including the restrictions on the jurisdictions of the judiciary were done away with. However Articles 323A and B were retained. With a second change of Government coercive steps to curb the judiciary were again resorted to in the matter of the transfer of newly appointed judges.[18]

---

[15] *Union of India v. Sankalchand Himatlal Sheth*, (1977) 4 see 193, at page 234.

[16] *coup de grâce* : A final blow or shot given to kill a wounded person or animal. (by extension) A remarkable finishing action.

[17] *See* Granville Austin: *Working a Democratic Constitution* p. 384.

[18] *See* N.A. Palkhiwala: Second Chimanlal Setalvad Memorial Lecture, 1982; Granville Austin: *The Supreme Court and Custody of the Constitution*: Supreme but not Infallible.

Small wonder then that after this, a battered judiciary (after an initial regrettable hiccup in the form of the decision in *S.P. Gupta*'s case[19]) picked itself up and with all the interpretative tools at its command — termed by many as an unacceptable feat of judicial activism — by a composite judgment in several public interest litigations[20] virtually wrested the powers of appointment, confirmation and transfer of judges from the Executive. Their reason for doing so was to secure the independence of the judiciary from Executive control or interference. Procedural norms were judicially prescribed for transfer and appointment of judges. At present every proposal for appointment or transfer of a judge can only be initiated by a collegium of senior judges together with the Chief Justice of the High Court or Supreme Court as the case may be. From being a mere consultant, the Chief Justice of India and the Supreme Court collegium now have the final word. As the Supreme Court put it

> No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India

and

> The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.

The insulation of the judiciary from executive interference in the matter of appointment and transfer of judges is now almost complete. But the question remains, has this almost complete insulation achieved the object for which the constitutional interpretation was strained to an extent never witnessed before or after? In my opinion it has not. It has just changed the actors without any change either in the roles or the method of acting. One of the criticisms of the earlier law, to quote the Supreme Court was:

> The mystique of this process (of appointments) is kept secret and confidential between just a few individuals, not more than two or four as the case may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions (sic) result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade–off.

[19] *S.P. Gupta v. Union of India*, 1981 Supp see 87.

[20] *S.C. Advocates-on-Record Assn v. Union of India* (1993) 4 see 441; Special Reference No.1 of 1998: (1998) 7 see 739.

The same criticism may be made with equal justification of the present procedure for appointments and transfer of judges. As I have said elsewhere 'the process by which a judge is appointed to a superior court is one of the best kept secrets in this country'[21]. The very secrecy of the process leads to an inadequate input of information as to the abilities and suitability of a possible candidate for appointment as a judge. A chance remark, a rumour or even third-hand information may be sufficient to damn a judge's prospects. Contrariwise a personal friendship or unspoken obligation may colour a recommendation. Consensus within the collegium is sometimes resolved through a trade-off resulting in dubious appointments with disastrous consequences for the litigants and the credibility of the judicial system. Besides, institutional independence has also been compromised by growing sycophancy and 'lobbying' within the system.

The solution as I see it lies not in a reversal to a *status quo ante*[22] but in the setting up of a judicial commission with all the powers now vested with the Chief Justice of India and the collegium of Supreme Court judges. This is at present the subject matter of intense public debate but the suggestion is not new. In 1981 the Supreme Court itself after noting the setting up of judicial Commissions by Australia and New Zealand to consider all judicial appointments including appointments of High Court Judges said:

> This is a matter which may well receive serious attention of the Government of India.[23].

In 1987 the Law Commission in its 121st Report suggested the setting up of a National Judicial Commission and suggested its composition[24]. The National Commission to Review the Working of the Constitution in its Report submitted in 2002 was also of the opinion that a National Judicial Commission should be set up for recommending appointments of all judges of High Courts and the Supreme Court with a composition different from that proposed by the Law Commission[25]. Others

[21]"Information and Fundamental Rights": Sarat Bose Memorial Lecture 2009, *Supreme Court Cases* (SCC) 2009 10(4): J49-59p.

[22]*Status quo ante*: The state of things as they were before; a preexisting state of affairs.

[23]*S.P. Gupta v. Union of India*, 1981 Supp SCC 87, at page 298. Since then several countries. including England and Wales have set up a Judicial Appointments Commission to appoint High Court judges.

[24]The Chief Justice of India (Chairman), three senior most judges of the Supreme Court; the retiring Chief Justice of India, three senior Chief Justices of High Courts, the Minister of Law and Justice, Government of India, the Attorney General and an outstanding law academic.

[25]The Vice President of India, the Chief Justice of India, two senior most judges of the Supreme Court, the Chief Justice of the High Court when considering an appointment to that court and the Minister of Law and Justice.

including retired judges have expressed the need for such a Commission but have differed as to its composition[26]. Whatever the composition, unless there are non-partisan members, well-defined objective criteria, with the possibility of choosing judges from a wider source than at present and that proceedings are open or at least recorded — the likelihood of not getting the best as judges and of arbitrariness in making judicial appointments will remain.

And now to answer the first question posed by me at the outset as to who composes the "judiciary". Historically and semantically all bodies form part of the judiciary which are vested

(a) with the power of resolving disputes between litigants,
(b) empowered to oversee the application and implementation of the law by the Executive and
(c) empowered to determine whether executive and legislative actions are constitutionally valid.

This definition includes in particular those tribunals who have, post the 42nd Constitutional Amendment, been vested with the jurisdiction earlier exercised by courts.

Although the Supreme Court intrepidly asserted the independence of the judiciary to justify virtually excluding the Executive from having any real say in the appointment of judges, it was timorous in defending the same independence when it was most needed namely in answering the question whether the powers of adjudication can be shared with the Executive. Under the Constitutional scheme in keeping with the separation of powers judicial functions are to be performed by the judiciary alone and not by the Executive. The Supreme Court declared that

> The competence of Parliament to make a law creating tribunals to deal with disputes arising under or relating to a particular statute or statutes cannot be disputed.[27]

If the Tribunals are manned by judicial officers one could have no quarrel with the declaration. In my view, the curtailment and transfer of judicial powers of a particular court by Parliament or a State legislature can only be to another judicial forum whether called a Tribunal or by any other name. This was the situation prior to the 42nd Amendment. There were Rent Tribunals, Labour Courts, Motor Claims

[26] V.R. Krishna Iyer, J: The Hindu: 20th October 2003; Rajinder Sachar, J.: The Hindu: 28th March 2003, PUCL Bulletin, February 2005.

[27] *Union of India v. R. Gandhi*, President, Madras Bar Association, (2010) II see I, at page 49.

Tribunals which were all manned by judges or former judges. It was for the first time post 1976 that the jurisdiction of the judiciary was sought to be curtailed by transferring the powers of court to the Executive.

In a Kalidas-like action of cutting the branch of the Constitutional tree on which the judiciary is sitting and what in less picturesque language one can describe as a judicial sell-out to the Executive, the Supreme Court has upheld the legislations establishing tribunals in a number of decisions[28] subject to certain 'adjustments' in the law which are more in the nature of sops to the concept of judicial independence rather than an assertion of it.[29]

To maintain the 'independence' of the judicial process needed to be followed by these tribunals to reach a decision, the Supreme Court has insisted on the appointment of 'judicial officers' such as former judges to head the tribunals. Judicial independence has also been the reason for excluding executive power in the matter of the appointment of even former judges as heads of tribunals[30].The exclusion of the High Courts' powers of judicial review has also been held to be unconstitutional and decisions of Tribunals have been made subject to "scrutiny by the High Courts"[31] Decisions taken by the Executive Members in Tribunals are required to be taken 'in a judicial manner' or like a judge i.e. impartially. All this is not enough. To borrow the language of the United States Supreme Court:

> the legitimacy of the judicial branch depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action.

Nevertheless these Tribunals continue to have members of the Executive discharging judicial functions and all members including the judicial members remain subject to the administrative and financial control of the Executive.

A recent judgment of the Supreme Court says

> The constitutional trade-off for independence is that judges must restrain themselves from the areas reserved to the other separate branches.[32]

---

[28] *S.P. Sam path Kumar v. Union of India*, (1987) 1 SCC 124; *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261; *Union of India v. R. Gandhi*, President, Madras Bar Association, (2010) 11 SCC I.

[29] They were readily conceded by the Executive without any reference to Parliament. *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124; *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

[30] *State of Haryana v. National Consumer Awareness Group*, (2005) 5 SCC 284, at page 292.

[31] *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261, at page 311.

[32] *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586, at page 612: per Katju, J.

That being so then why or indeed how, having regard to the principle of separation of powers, can the power of adjudication be shared with or be transferred to or be subject to the control of the Executive which is what tribunalisation has come to mean in this country?

Besides it would be too much to expect a Government Official who has represented and been and in some cases continues to be part of the Executive machinery and who has been committed to give effect to the policies framed by his/her political masters throughout his/her career (as every good Government official is expected to do), to suddenly be asked to discharge judicial functions which often requires a decision to be taken against the Government.

Why is this at all necessary? Delay, arrears of cases, specialized knowledge etc. have been usually cited as reasons for the creation of such tribunals. If the work of the judiciary is being hampered because of the litigation explosion, the Constitution envisages more judges being appointed and courts set up which can function with all the safeguards of insulation, independence and autonomy as part of the judicial system. The Constitution also allows the appointment of additional and acting judges to deal with an increase in the business or the arrears of work of the High Courts and the Supreme Court[33]. It was not envisaged under the constitution as originally framed that the lacunae, if any, in the functioning of the judiciary at whichever level, would be filled by the Executive. As Chief Justice Subba Rao speaking for a Bench of 5 judges said in 1966.[34]

> It is unreasonable to attribute to the makers of the Constitution (who had so carefully provided for the independence of the judiciary) an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district Judges (and now at the level of High Court judges), recruitment from the executive departments?

But according to a recent pronouncement of the Supreme Court

> The presence of a technical member ensures the availability of expertise and experience related to the field of adjudication for which the special Tribunal is created, thereby improving the quality of adjudication and decision making.[35]

By that token all courts should have technical members to improve the 'quality of decision making'. Traditionally if technical expertise is required it is open to courts

[33] Articles 128 and 224(1).

[34] *Chandra Mohan v. State of UP*: AIR 1966 SC 1987.

[35] *Union of India v. R. Gandhi*, President, Madras Bar Association, (2010) II see I, at page 40.

to seek the opinion of an expert as a witness but not as a colleague on the Bench. To have technical members (meaning officers of the Executive) on a Tribunal is as repugnant to the independence of the judiciary as, for example, having the Secretary of the Ministry of Finance sitting on a Bench of the Supreme Court or High Court to decide income-tax matters. A more serious in-road into institutional judicial independence would be hard to find.

Besides the 'tribunalisation' of justice has not worked in India. In 1997 the Supreme Court acknowledged

> Tribunals have been functioning inefficiently. ... The situation at present is that different tribunals constituted under different enactments are administered by different administrative departments of the Central and the State Governments. The problem is compounded by the fact that some tribunals have been created pursuant to the Central legislations and some others have been created by State legislations.

More than a decade later, if one is to go by the Report of the Chairperson of the Intellectual Property Appellate Board submitted to the Madras High Court recently, the situation has not improved[36].

The litigant, in whose apparent interest tribunalisation has and is taking place has been the worst sufferer. When most of the rights are claimed by citizens against the Government how can people have faith in a body if even one member is perceived as being part of the Government? The credibility of the judicial process "comes from the office of the judge and his or her individual and institutional reputation for independence".[37]

Additionally every decision of a tribunal is subject either to appeal before the High Court or Supreme Court and subject to judicial review. This has only meant further delay and expense for a litigant because of additional rounds of litigation. Several brave High Court judges have tried with faultless reasoning to set right this Constitutional anomaly in their decisions[38] but have unfortunately failed to convince the Supreme Court up till now.

There is another seemingly minor exception to judicial independence contained in the Foreign Contribution (Regulation) Act, 1976. Apart from other restrictions, the Act initially forbade, except with the permission of the Central Government,

---

[36] *See* in this connection Report submitted by the Chairperson, IPAB to the Madras High Court in *Shamnad Basheer v. Union of India* (W.P. 1256 of 2011).

[37] Jack Beatson: *Should Judges Conduct Public Inquiries*: Vol. 121 *LQR* 221, 243.

[38] *Sakinala Hari Nath v. State of A.P.*: (993) 2 An WR 484; See further *L. Chandra Kuma v. Union of India* (1997) 3 SCC 261,284 paras 37, 38.

the acceptance of foreign hospitality by members of Legislatures, office bearers of political parties and employees of corporations[39].

In 1985, when the Law Ministry was headed by an eminent lawyer[40], the Act was amended to include judges (thus proving my theory that sometimes the worst enemies of Judges are those lawyers who while being members of the Bar also serve in the capacity of politicians). At present no judge, whether of the Supreme Court or the High Courts can accept any invitation from any foreign person or organization or indeed even visit a foreign country out of his/her personal funds, unless an application is made to the State and Central Governments *with the approval* of the Chief Justice two months ahead of the date of departure and the application is vetted by different Ministries and ultimately allowed or disallowed by an executive order which may or may not be received before the date fixed for leaving! Even if permission is granted by the Government to accept an invitation it is subject to the air-fare being *agreed* to be paid by the Government. Clearly the Government considers that being accommodated, wined and dined by a foreigner do not come within the word 'hospitality'! It also overlooks the fact that a judge would be obliged to various Joint Secretaries of the Government for exercising their discretion in favour of the judge not only in granting permission. but also agreeing to bear the air-fare — a dangerous situation since the largest litigant before any court is the Government. Besides if the Chief Justice as the administrative head of the judiciary in each High Court and the Chief Justice of India in the Supreme Court approve, to subject the judge to Executive control does, in my opinion, interfere with the institutional independence of the judiciary. To complete the insulation of the judiciary the mischief created in 1985 must be undone.

An Independent Judge

The independence of the judiciary and of the judicial system of course ultimately depends on the personal integrity of each judge. It goes without saying and I do not intend to dwell on the fact that judges have to be above corruption in the monetary sense. But it needs restating just as it needed stating in 1988 when judges of 37 countries gathered in Bangalore and formulated what have come to be known as the Bangalore Principles. The principles are intended to establish standards for the ethical conduct of judges. Detailed guidelines have been classified under 6

[39] Section 9.

[40] Likely referring to Ashoke Kumar Sen who was the Law Minster between 1984–87 in Rajiv Gandhi Government.

heads termed 'values': Independence, Integrity, Impartiality, Propriety, Equality, Competence and Diligence. In fact all six values are facets of the first and cardinal one of 'independence'. Judges are fierce in using the word as a sword to take action in contempt against critics. But the word is also used as a shield to cover a multitude of sins some venial and others not so venial. Any lawyer practising before a court will I am sure have a rather long list of these. I have chosen seven.

The first is the sin of "brushing under the carpet" or turning a Nelsonian eye. Many judges are aware of injudicious conduct of a colleague but have either ignored it or refused to confront the judge concerned and suppressed any public discussion on the issue often through the great silencer — The Law of Contempt.[41]

The second sin is that of "hypocrisy". A favourite rather pompous phrase in judgments is "Be you ever so high, the law is above you"[42] or words to similar effect. And yet judges who enforce the law for others often break that law with impunity. This includes traffic regulations and any other regulation to which the "ordinary" citizens are subject. Some in fact get offended if their cars are held up by the police at all while controlling the flow of traffic — the feeling of offence sometimes being translated into action by issuance of a rule of contempt against the hapless police constable[43] all in the name of judicial independence[44].

The third sin is that of secrecy. The normal response of Courts to any enquiry as to its functioning is to temporize, stone-wall and prevaricate. As I have said elsewhere that the process by which a judge is appointed to the High Court or elevated to the Supreme Court is one of the best-kept secrets in the country. The issue whether the records relating to appointments of judges to the Supreme Court can be directed to be produced under the Right to Information Act is now pending decision before the Supreme Court[45] after which perhaps we will come to learn of the logical connection between judicial independence and secrecy.

If 'independence' is taken to mean 'capable of thinking for oneself' then the fourth sin is plagiarism and prolixity. I club the two together because the root cause is often the same namely the prolific and often unnecessary use of passages from text-books and decisions of other judges — without acknowledgment in the first case and with acknowledgment in the latter. Many judgments are in fact mere compendia

[41] *See* for example *Surya Prakash Khetri v. Madhu Trehan* 2001 Cr. LJ. 3476.

[42] *See* for example: *S.P. Gupta v. Union of India*, 1981 Supp see 87, at page 223; Arundhati Roy, In re:, (2002) 3 see 343; *Bangalore Medical Trust v. B.S. Muddappa*, (1991) 4 see 54, al page 92.

[43] *See* for example: *Biman Basu v. Kallol Guha Thakurta*, (2010) 8 SCC 673.

[44] *Red Lights on the Cars of the Hon'ble Judges of the High Court v. State of U.P*. 1988 Cr. L.J. 4212.

[45] Central Public Information Officer, *Supreme Court of India v. Subhash Chandra Agrawal*, (2011) 1 SCC 496.

or digests of decisions on a particular issue with very little original reasoning in support of the conclusion.

Often judges misconstrue judicial independence as judicial and administrative indiscipline. Both of these in fact stem from judicial arrogance as to one's intellectual ability and status. A judge's status like other holders of public posts is derived from the office or the chair. One has to merely occupy that chair during one's tenure with dignity and remember that each time a lawyer bows and says "Deeply obliged" — the bow is addressed to the office and not to the person. The Supreme Court has laid down standards of judicial behaviour for the sub-ordinate judiciary such as

> He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, and fearless of public clamour, regardless of public praise[46]

but sadly some members of the higher judiciary exempt themselves from the need to comply with these standards.

Intellectual arrogance or what some may call intellectual dishonesty is manifest when judges decide without being bound by principles of *stare decisis* or precedent.[47] Independence no doubt connotes freedom to decide but the freedom is not absolute. It is bound to be in accordance with law. Otherwise we have lawyers and the sub-ordinate judiciary baffled while "mastering the lawless science of our law" faced with "that codeless myriad of precedent, that wilderness of single instances."[48] Independence implies discipline to decide objectively and with intellectual integrity and as the judicial oath of office requires, without fear, favour, affection or ill will. Most importantly judges must be perceived as so deciding or to use Lord Hewart's classic *dicta* that

> Justice should not only be done, but should manifestly and undoubtedly be seen to be done,[49]

because the belief of corruption is as damaging to the credibility in the independence of the judiciary as the act of corruption.

This brings me to the seventh and final sin of nepotism or what the oath of office calls 'favour' and 'affection'. What is required of a judge is a degree of aloofness and reclusiveness not only *vis a vis* litigants but also vis a vis lawyers. Litigants include the Executive. Injudicious conduct includes known examples such as judges using

[46] *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil*, (1997) 6 SCC 339, at page 355.

[47] *See* for example *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586, at page 623.

[48] Alfred Tennyson.

[49] *R. v. Sussex JJ*, ex p McCarthy: (1924) I KB 256.

a guesthouse of a Private Company or a Public Sector Undertaking for a holiday or accepting benefits like the allocation of land from the discretionary quota of a Chief Minister.

I can only emphasise again that nothing destroys a judge's credibility more than a *perception* that he/she decides according to closeness to one of the parties to the litigation or what has come to be described in the corridors of courts as 'face value'. As the Bangalore Principles succinctly puts it:

> A judge shall not ... convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.[50]

And here I would like to pay tribute to the great majority of judges who are to quote N.A. Palkhiwala men (and women) of integrity, combining character with calibre[51] who are holding the fort against 'enemies' both within and outside the system by discharging their duties with courage and independence.

I will conclude with the most important facet of judicial independence. Judicial independence cannot exist without accountability. At present the only disciplinary power over judges is vested in Parliament which provides for the extreme punishment of removal for acts of proven misbehaviour by or incapacity of a judge.[52] Disciplinary methods include the Chief Justice advising a dishonest judge to resign or recommending a judge's name to the Chief Justice of India for transfer to another High Court.

Deprivation of jurisdiction or the non-allocation of work to a dishonest judge was resorted to by Chief Justice Sabyasachi Mukharji — when the impeachment of Justice V. Ramaswamy failed for political reasons. Sometimes Chief Justices control a recalcitrant judge by ensuring that the judge concerned sits with the Chief Justice or with a 'strong' judge until he or she retires.

The situation becomes more difficult if the allegations are against the Chief Justice. Solutions evolved have proved inadequate and ad hoc. There is a need for an effective mechanism for enforcing judicial accountability.[53] The Judicial Standards and Accountability Bill 2010 now under consideration before Parliament provides for a mechanism for enforcing judicial discipline under a National Judicial Oversight

[50] Clause 4_9.

[51] N.A. Palkhiwala: *We, the Nation: Crisis of Public Faith in the Judiciary* at page 223.

[52] Article 124(4), Article 217(1)(b).

[53] *See* in this connection Mechanism for Judicial Accountability by J. S. Verma, Former Chief Justice of India.

Committee. But I would add a Caveat using the language of a Resource Document for the establishment of judicial accountability mechanisms in South Africa[54]:

> that *accountability mechanisms* [must be] *embedded in the judiciary and satisfy the appropriate standards for judicial autonomy, respect the separation of powers framework, and are transparent and publicly known*.

This would be in keeping with that "independence" which as I said at the outset the Constitution so 'copiously' protects.

[54] IDASA: March 2.